**UNITED STATES DISTRICT COURT**

**DISTRICT OF CONNECTICUT**

| | | |
|---|---|---|
| HEIDRUN BRILL-EDWARDS, as Executrix of the Estate of Harry Brill-Edwards and Individually, | : | |
| Plaintiff, | : | |
| | : | |
| -vs- | : | Civ. No. 3:01cv915 (PCD) |
| | : | Civ. No. 3:01cv1768 (PCD) |
| RYDER TRUCK RENTAL, INC., *et al.*, | : | |
| Defendants. | : | |

**RULING ON MOTION FOR PROTECTIVE ORDER**

Defendants move pursuant to FED. R. CIV. P. 26(c) and FED. R. CIV. P. 26(b)(4)(B) for a protective order precluding the deposition of John Goebelbecker, a non-testifying expert witness For the reasons set forth herein, the motion is **granted**.

I. BACKGROUND

The present action involves an automobile accident involving one of defendants' trucks and a 2001 Oldsmobile Aurora driven by the decedent Harry Brill-Edwards. John Goebelbecker was retained by defendants to reconstruct the accident scene. Goebelecker prepared an aerial photograph of the accident scene with superimposed vehicles, retrieved a sensing diagnostic module (data recorder) installed in the Aurora and generated a printout of the data contained in the recorder. Goebelecker was not disclosed as an expert witness for defendants, however his work product is cited in an report by defendants' expert James Hrycay and an aerial photograph created by him depicting the scene of the accident was used to cross-examine plaintiff's accident reconstructionists, Richard Hermance and John McManus.

On December 23, 2002, plaintiff noticed the deposition of Goebelecker. Defendants objected to the deposition on the ground that Goebelecker is a non-testifying expert pursuant to FED. R. CIV. P. 26(b)(4)(B).[1]

II. DISCUSSION

Plaintiff argues that FED. R. CIV. P. 26(b)(4)(B) does not apply as the deponent's work product has been placed at issue through its use in depositions, that defendants have waived any claimed protection through the use of work product in depositions, and exceptional circumstances warrant the deposition. Defendants respond that there is no indication that Hrycay relied on the data in drafting his report and the photograph and report constitute depictions of data, not expert opinion or data interpretation.

"Where . . . the [discovery is] relevant, the burden is upon the party seeking . . . a protective order to show good cause." *Penthouse Int'l, Ltd. v. Playboy Enters.*, 663 F.2d 371, 391 (2d Cir. 1981) (citation omitted); *see also* FED. R. CIV. P. 26(c); *Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992) (burden is on moving party to show good cause). FED. R. CIV. P. 26(c), however, "is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court's processes." *Bridge C.A.T. Scan Assocs. v. Technicare*

---

[1] FED. R. CIV. P. 26(b)(4)(B) provides "A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

*Corp.*, 710 F.2d 940, 944-45 (2d Cir. 1983).

The materials produced by Goebelbecker do not appear to involve expert opinion or analysis. As an initial matter, the "report" is referred to as "data" in the Hrycay's report. There is no apparent interpretation of the recorder data, and the document appears to indicate by its heading, "Vetronic" and "Crash Data Retrieval System (CDR)," that it is the product of some proprietary software. It is not apparent that the graphs and values provided therein are any more than a form of presenting data extracted from the recorder. The only text appears to be a generic statement describing terms and details relevant to the information displayed. It thus does not appear that the document is more than the presentation of raw data taken from the recorder.

The aerial photograph appears to be a picture of a highway on which is superimposed the starting position of defendants', hash marks representing the distance from the purported resting point, and a representation of the various vehicles after the crash. Plaintiff contends that the superimpositions on the photograph are depictions of information drawn from the Connecticut State police report, and details of the nature depicted on the photograph would be expected from a typical police report on an accident of this nature. There again appears to be no indication that Goebelbecker engaged in interpretation to create the final product.

There is no dispute that Goebelbecker was retained by defendants for purposes of preparing for litigation and that he is not disclosed as an expert, thus his testimony at trial is not expected. *See Hoover v. Dep't of the Interior*, 611 F.2d 1132, 1141 n.12 (5th Cir. 1980) (describing relevant standard as whether testimony of non-disclosed expert is expected, not whether it is possible). As

such, the attempt to disclose him implicates FED. R. CIV. P. 26(b)(4)(B),[2] and his deposition is conditioned on plaintiff's demonstrating exceptional circumstances requiring such deposition. *See Eliasen v Hamilton*, 111 FRD 396, 402 ((N.D. Ill.1986).

Exceptional circumstances require that "it is impracticable . . . to obtain facts or opinions on the same subject by other means." FED. R. CIV. P. 26(b)(4)(B). The argument that a reference to or use of his work product in depositions or expert reports somehow "opens the door" to his answering for his work product is unprecedented. The origin of the data presented in his work product is stated to be a data recorder and a police report. If such is the case, and plaintiff argues no basis on which to conclude otherwise, there is no basis on which to depose him. To permit such a deposition in the absence of any evidence that he provides expert opinion and such opinion is relied on by testifying experts, a proposition not supported by the expert report and photograph involved herein, would in effect allow plaintiff to verify and use data defendants have gathered without incurring the expense. *See Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122,1138 (S.D. Tex. 1976). Avoiding such outcomes is the very reason the rule was created, *see id.*, and plaintiff cites to no authority on which to conclude Goebelbecker may appropriately be deposed.

IV. CONCLUSION

Plaintiff's motion for a protective order (Doc. No. 46) is **granted**.

---

[2] FED. R. CIV. P. 26(b)(4)(B) provides "A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

SO ORDERED.

Dated at New Haven, Connecticut, January ___, 2002.

_____

Peter C. Dorsey
United States District Judge